



Signed: November 02, 2007

EDWARD D. JELLEN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 05-48372 EDJ
Adv. No. 06-4043 AJ
RICHARD A. SWAIN,
Debtor. /
SARAH ALAM,
Plaintiff,
vs.
RICHARD A. SWAIN,
Defendant. /

DECISION

By this adversary proceeding, plaintiff Sarah Alam ("Alam") seeks to render a debt she is owed by Richard A. Swain, the above debtor ("Swain"), nondischargeable pursuant to Bankruptcy Code § 523(a)(2)(A)¹ and (B).² The court will enter judgment in favor of

¹Bankruptcy Code § 523(a)(2)(A) provides as follows:

A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt - (2) for money, property, services, or an extension, renewal, or refinancing of
(continued...)

Decision

1 Swain.

2 A. Facts

3 The evidence Alam presented at trial was in large part
4 different than the allegations of her complaint. The complaint
5 alleges that Swain misrepresented himself to Alam as a different
6 person, Richard F. Swain, and used this false identity to induce her
7 to extend credit. The complaint also alleges that Swain was a
8 "consummate con artist" that preyed on young females by inducing
9 them to lend him money to payoff prior victims that had threatened
10 Swain with lawsuits. Alam, however, presented no admissible
11 evidence to support these allegations.

12 What the evidence did show was that, at the time of the acts
13 complained of, Swain was a licensed flooring contractor. He met
14 Alam in 2003. After the two of them dated for several months, Swain
15 moved in with Alam. Thereafter, Alam lent Swain substantial sums of
16 money, and essentially supported him by providing him with a rent-
17 free place to live, food, use of her credit card, and many gifts.

18 During the period Swain lived with Alam, Alam introduced Swain
19 to her sister, Jawadia Alam ("Jawadia"), who was in need of some
20

21 ¹(...continued)
22 credit, to the extent obtained by - (A) false pretenses, a false
23 representation, or actual fraud, other than a statement
respecting the debtor's or an insider's financial condition.

24 ²At trial Alam abandoned her claim for relief under
25 Bankruptcy Code § 523(a)(2)(B) (obtaining credit by a false
26 statement in writing respecting the financial condition of the
debtor or an insider).

1 remodeling work at her home. Swain attempted to do the work.
2 Unfortunately for Jawadia, who is not a party to this action, Swain
3 botched the job. Swain performed work that he was not licensed to
4 perform, and hired subcontractors that were not licensed. Many of
5 the materials that Swain purchased for the job were paid for by
6 Alam.

7 Alam was aware during the period that she was lending money to
8 Swain that Swain did not have the ability to repay any of the loans.
9 Alam testified that by December of 2003, she had no confidence that
10 Swain would ever be able to repay her anything. To induce Alam to
11 continue lending him money, Swain told her that Burton Milburn
12 ("Milburn"), who had initially recommended Swain to Alam, would
13 guaranty his debts to her. That month, Milburn came to Alam's home
14 and signed a document he tore out of a legal form book headed
15 "Specific Guaranty." In reliance on the Specific Guaranty, Alam
16 continued to lend money to Swain.

17 Alam testified at trial that she lent Swain some \$49,000 over
18 the course of their relationship, and that she lent approximately
19 two-thirds of that amount after Milburn had provided her with the
20 Specific Guaranty.

21 Swain eventually moved out, owing Alam substantial sums. He
22 filed his voluntary chapter 7 petition on October 14, 2005. Alam
23 sued Milburn on the Specific Guaranty, and for reasons hereinafter
24 mentioned, settled her lawsuit against Milburn for the sum of
25 \$15,000.

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1 B. Discussion

2 To prevail under Bankruptcy Code § 523(a)(2)(A), a creditor
3 must establish that: (1) the debtor made a representation, (2) with
4 knowledge of its falsity, (3) with the intention and purpose of
5 deceiving the creditor, (4) that the creditor justifiably relied on
6 the representation, and (5) that the creditor sustained damage as
7 the proximate result thereof. In re Kirsh, 973 F.2d 1454, 1457 (9th
8 Cir. 1992); In re Britton, 950 F.2d 602, 604 (9th Cir. 1991). The
9 creditor must establish each of these elements by a preponderance of
10 the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654 (1991).

11 At trial, Alam presented two theories why Swain's debt to her
12 should be nondischargeable under Bankruptcy Code § 523(a)(2)(A).
13 First, Alam contends that Swain defrauded her by providing her with
14 the Specific Guaranty knowing that it was invalid. Second, Alam
15 contends that she extended credit to Swain in reliance on his
16 misrepresentation or false pretense that he was a general
17 contractor. Both theories fail.

18 1. The Specific Guaranty

19 Alam bases her contention concerning the Specific Guaranty on
20 the facts that the word "Witness," appears below Milburn's signature
21 on the Specific Guaranty, and that after she sued Milburn, Milburn
22 claimed that he did not sign the Specific Guaranty as a guarantor,
23 but only as a witness.

24 This argument fails for numerous reasons. First, the argument
25 assumes that the Specific Guaranty was not effective as Milburn's
26 guaranty, even though this assumption is not necessarily a correct

1 one. The Specific Guaranty reads, in relevant part:

2 [A]s an inducement for Sarah Alam . . . Creditor) to
3 extend credit to Richard Swain . . . (Borrower); the
4 undersigned jointly, severally and unconditionally
5 guarantee to Creditor the prompt and full payment of the
6 following obligation: Any money borrowed by Richard Swain.
. . . In the event of default, the Creditor may seek
payment directly from the undersigned without need to
proceed first against the Borrower, and the undersigned
waive all suretyship defenses. . . .

7 The Specific Guaranty was signed by Alam, Swain, and Milburn. The
8 printed word "Creditor" appears below Alam's signature; the printed
9 word "Borrower" appears below Swain's signature; the printed word
10 "Witness" appears below Milburn's signature. There is no signature
11 line on the form bearing the printed word "Guarantor."

12 But who, other than Milburn, could have been the "undersigned"
13 against whom Alam could "seek payment directly without need to
14 proceed first against the Borrower"? The answer, clearly, is no
15 one: the Specific Guaranty makes no sense and could have no purpose
16 unless it is Milburn's guaranty of Swain's debt to Alam. And this
17 is so notwithstanding the printed word "Witness" below Milburn's
18 name.

19 The court before which Alam's lawsuit against Milburn was
20 pending made no finding as to effectiveness of the Specific Guaranty
21 because, as previously mentioned, Alam elected to settle.

22 If the Specific Guaranty had been found to have been valid,
23 however, it would follow that Swain made no misrepresentation to
24 Alam concerning its legal effect.

25 But even if the Specific Guaranty might have been found to have
26 been invalid, Alam would still not prevail herein as to this claim.

1 Alam presented absolutely no evidence to this court that would
2 suggest that Swain had any knowledge as to the invalidity of the
3 Specific Guaranty. Nor did Alam present any evidence showing that
4 Swain had any knowledge at the time Milburn signed the Specific
5 Guaranty that Milburn would later disclaim liability thereunder.

6 Moreover, the Specific Guaranty was taken from a legal form
7 book, and thus was not a document that Swain designed for purpose of
8 deceiving Alam. In addition, Swain has had no legal training, and
9 received no legal opinion in advance of the signing of the Specific
10 Guaranty as to its validity or lack thereof. Therefore, Swain could
11 not have known that the Specific Guaranty was not valid when, at
12 best from Alam's point of view in the present litigation, its legal
13 effect was unclear.³

14 For the same reasons, Alam, knowing that Swain had no legal
15 training, could not have justifiably relied on any views Swain may
16 have expressed as to the legal enforceability of the Specific
17 Guaranty.

18 The court holds that Alam's claim regarding the Specific
19 Guaranty is without merit.

21 ³The court hearing Alam's suit against Milburn had ruled
22 that parole evidence would not be admissible to construe the
23 Specific Guaranty. Based exclusively on the "four corners" of
24 the Specific Guaranty, and for the reasons mentioned above, if
25 the issue as to the enforceability of the Specific Guaranty had
26 been before this court, this court would have ruled that,
notwithstanding Milburn's disclaimer of liability, the Specific
Guaranty was an enforceable guaranty by Milburn of Swain's debt
to Alam.

1 2. General Contractor

2 Alam contends that Swain misrepresented to her that he was a
3 general contractor, when in fact, he was licensed only as a flooring
4 contractor, and that she would not have extended credit to Swain had
5 she known the actual facts. This argument is not well grounded.

6 First, Alam admitted at trial that Swain never once
7 misrepresented to her that he was a general contractor. Rather, he
8 told her, truthfully, that he was a contractor. The weight of the
9 evidence showed that Alam assumed Swain was a general contractor
10 because of the general contractor type work he was doing at
11 Jawadia's home.

12 Secondly, Alam failed to establish that she extended Swain any
13 credit in justifiable reliance on any misrepresentations by Swain
14 concerning his professional license. Even if Swain had falsely
15 represented to Alam that he was licensed as a general contractor,
16 Alam failed to explain why Swain being a general contractor, rather
17 than just a contractor, would have been a material factor in her
18 decision to extend credit. This is especially true because Alam
19 knew at all times during the period she was lending money to Swain
20 that he was, in fact, unable to repay her anything.

21 Moreover, Alam admitted that by December 9, 2003, when Milburn
22 signed the Specific Guaranty, she had given up all hope of being
23 repaid by Swain, and that she was extending Swain credit in
24 exclusive reliance on the Specific Guaranty.

25 In short, the weight of the evidence showed that Alam extended
26 credit to Swain, initially, based on their close personal

1 relationship, and after December 9, 2003, based on the Specific
2 Guaranty. The court therefore holds that Alam did not extend any
3 credit to Swain in justifiable reliance on any misrepresentations by
4 Swain.

5 C. Conclusion

6 For the foregoing reasons, the court will enter judgment in
7 favor of Swain.

8 **END OF ORDER**
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COURT SERVICE LIST

ALL RECIPIENTS

Decision

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